

No. 14,920

IN THE

United States Court of Appeals  
For the Ninth Circuit

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EDDIE L. BURDIX,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the District Court of the United States  
for the District of Alaska, Fourth Judicial Division.

APPELLEE'S REPLY BRIEF.

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THEODORE F. STEVENS,

United States Attorney,

Box 111, Fairbanks, Alaska,

*Attorney for Appellee.*

FILED

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**JURISDICTION.**

Jurisdiction of the District Court was invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 966, as amended May 24, 1949, c. 139, sec. 114, 63 Stat. 105; 28 U.S.C. 2255.

Jurisdiction of this Court has been alleged by appellant under 28 U.S.C. 1291. Appellee submits that the jurisdiction of this Court is specifically set forth in 28 U.S.C. 2255. "An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." This Court has no jurisdiction over this appeal.

**STATEMENT OF THE CASE.**

Appellant was charged in an indictment filed November 4, 1953, with possession and sale of heroin, a narcotic drug, in violation of Section 40-3-2, A.C.L.A., 1949. He was tried by a jury and convicted. Sentence was passed on May 18, 1954, requiring Burdix to serve five years imprisonment in the custody of the Attorney General. All proceedings herein took place in the District Court for the District of Alaska, Fourth Judicial Division. At the trial, the Honorable Harry E. Pratt, former District Judge, presided.

On November 11, 1954, Burdix filed a motion to vacate and set aside the judgment and sentence pursuant to 28 U.S.C. 2255. The District Court, the Honorable Vernon D. Forbes presiding, required the United States to appear and respond to Burdix's motion. (Appendix "A".) On March 4, 1955, said Judge denied this motion. (Appendix "B".) Burdix then sought to appeal in forma pauperis to this Court (the exact date of filing is unknown). This purported appeal was dismissed. (Misc. No. 423, March 21, 1955.) Burdix had filed a copy of his motion to this Court with the District Court. That Court treated said motion as having been properly filed there and denied the same, specifically finding that the appeal was not taken in good faith. (Appendix "C".) On April 27, 1955, appellee was served with a "Brief in Support of Appeal", wherein Burdix stated that he was appealing to this Court from the order dated March 4, 1955. (Appellee considered this brief

as having been filed in support of the motion denied March 21, 1955 by this Court.)

On June 21, 1955, appellee received a copy of a "Petition to Vacate and Set Aside Judgment," which had evidently been filed in this Court. Burdix also filed several motions for writs of mandamus in the District Court (see Appendix "D") and at least one petition for the same writ from this Court. On November 12, 1955, Burdix presented a petition to this Court for leave to appeal in forma pauperis, which motion was denied on December 2, 1955.

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## ARGUMENT.

### I.

#### APPELLANT HAS NO VALID APPEAL BEFORE THIS COURT.

Burdix has failed to comply with Rule 73(a) of the Federal Rules of Civil Procedure, for no formal notice of appeal from the order of the District Court dated March 4, 1955, was ever filed with the District Court. Burdix did file a motion for leave to appeal from the judgment and commitment dated May 18, 1954, and this motion was denied. A motion for leave to proceed in forma pauperis, filed in this Court, may satisfy the requirement that a notice be filed within 60 days. (*West v. U. S.*, 222 F. 2d 774 (D.C. Cir. 1954).) However, the *West* case and other similar holdings (e.g., *Gerringer v. U. S.*, 213 F. 2d 346 (D.C. Cir. 1954)), resulted in the Court of Appeals giving the petitioner 10 days in which to file the appropri-

ate notice and motion in the District Court. In this case, the District Court has already specifically ruled upon Burdix's motion and denied the same. (Appendix "C".)

Appellant has, therefore, been denied the right to appeal in forma pauperis, even if his erratic procedure is deemed to have complied with Rule 73. He persists, however, in this proceeding. He has not, to appellee's knowledge, filed the record and documents required by the Rules of this Court and the Federal Rules of Civil Procedure. No transcript has been prepared. Instead, this Court is asked to review Burdix's version of the transcript and to accept his statements as to the proceedings below and the dates upon which he made his various motions. (Appellee, however, is also guilty of this procedure. No record having been prepared, appellee has attached hereto a copy of the government's response to Burdix's motion under 2255. Appendix "A".) Appellee fails to ascertain how he can be permitted to proceed in this fashion, particularly in view of the decision, dated December 2, 1955, in which this Court denied Burdix permission to proceed in forma pauperis. The defects in appellant's procedure may be excusable. (*cf.*, *West v. U. S.*, *supra*, p. 778.) However, appellee submits that if this Court reviews appellant's appeal on the record before it now, the precedent established may well open a veritable "Pandora's Box" which will plague this Court and lower Courts as well. A mere recitation of Burdix's motions, pleadings, and the various other documents filed to date demonstrates

that he has flooded this Court, the District Court, and the U. S. Attorney's office with frivolous and irrelevant material since he started this procedure. If, from all of this maze, the Court is to salvage a good appeal, without a transcript, without compliance with the applicable Rules, and with specific denial of appellant's right to proceed in forma pauperis having been made by both Courts, appellee believes that the purpose of Section 2255 will have been completely destroyed.

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II.

THE DISTRICT COURT PROPERLY ~~DEEMED~~<sup>DENIED</sup> APPELLANT'S  
MOTION UNDER 28 U.S.C. 2255.

Appellant's motion under 2255 and the appeal therefrom is not a substitute for an appeal. (*Taylor v. U. S.*, 177 F. 2d 195 (4 Cir. 1949).) This Court has no jurisdiction to entertain the motion filed here to vacate and set aside the sentence. (*Flynn v. U. S.*, 222 F. 2d 541 (9th Cir. 1955); *cf.*, *Taylor v. Squier*, 183 F. 2d 67 (9th Cir. 1950).) All that is before this Court, if anything, is the appeal from the order dated March 4, 1955. In that order the District Court considered appellant's contentions that: (1) the government failed to show "continuity of possession" by the defendant of the heroin at the trial; (2) the trial Court had excluded all adults from the courtroom during trial and filled the courtroom with children "unquestionably to influence the jury"; (3) petitioner was not adequately represented by counsel be-

cause George McNabb, Esquire, volunteered to represent him; (4) the trial Court erred re the admission of evidence; and (5) the instructions to the Court were erroneous.

The District Court ruled:

“After careful consideration of the motion and the files and records of the case, the Court concludes that the prisoner’s petition is without merit and must be denied.”

Appellant’s brief demonstrates that he wishes this Court to review the whole trial and consider this an appeal on the merits. Section 2255 was not designed to substitute for an appeal; (*Taylor v. U. S.*, 177 F. 2d 195 (4 Cir. 1949); *Hudspeth v. U. S.*, 183 F. 2d 68 (6th Cir. 1950)); the remedy available under Section 2255 is no greater than that available by habeas corpus. (*cf.*, *U. S. v. Hayman*, 342 U. S. 205 (1951).)

The only alleged constitutional violation presented here, which was reviewed by the District Court, is that the appellant was denied the assistance of counsel. His own brief sets forth that Mr. McNabb represented him all through the proceedings in the District Court. Mr. McNabb is an officer of this Court. In his motion presented to the District Court on November 11, 1954, Burdix stated:

“After being in jail six or seven weeks, I was visited by George McNabb, Attorney at Law. I had met him previously while serving a party that he and some of his friends attended. Mr. McNabb offered me legal advice and assistance in helping me secure my release.”

Appellant was represented by able counsel. He has made no showing that he was denied counsel or that he failed to assert constitutional rights because of ignorance. (*cf.*, *Crowe v. U. S.*, 175 F. 2d 799 (4 Cir. 1949); *Alred v. U. S.*, 177 F. 2d 1948 (4 Cir. 1949).)

All other alleged errors related to errors committed by the trial Court, none of which raised a constitutional question, or are new allegations made for the first time on this appeal. As pointed out above, this remedy is not a substitute for an appeal, nor does this Court have jurisdiction to hear appellant's allegations under 2255 raised for the first time here.

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### CONCLUSION.

Appellee submits that this Court is without jurisdiction over the subject matter herein. If this Court should rule that the jurisdictional requirements have been fulfilled, then it is also submitted that the order of the Court below was proper.

Dated, Fairbanks, Alaska,  
February 8, 1956.

Respectfully submitted,  
THEODORE F. STEVENS,  
United States Attorney,  
*Attorney for Appellee.*

(Appendices "A", "B", "C" and "D" Follow.)



## **Appendices.**



## Appendix "A"

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In the District Court for the District of Alaska  
Fourth Judicial Division

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United States of America,

Plaintiff,

vs.

Eddie L. Burdix, also known as  
"Shorty the Barber", hereinafter  
referred to as Eddie L. Burdix,  
Defendant.

No. 1775 CR.

### REPLY TO MOTION TO VACATE AND SET ASIDE JUDGMENT AND SENTENCE.

Comes now Theodore F. Stevens as attorney for the United States and replies to petitioner's contentions as follows:

#### I.

The first contention of petitioner deals with the so-called "chain of evidence" doctrine. No point was raised in this case that the government did not show continuity of possession. Melvin Austin testified that he purchased the drug from Burdix, whose actions were witnessed by two law enforcement officers. Neither officer actually saw the transaction, but both knew that Austin did not have the narcotic when he approached Burdix and that Austin did have the

narcotic when searched immediately upon leaving Burdix.

## II.

Petitioner has not presented the true facts to the Court in his second contention. As shown by the attached affidavit, the court room was not cleared of adults or juveniles. During the afternoon of the trial, for a short period only, a group of students from the Fairbanks schools did visit the court room.

Petitioner's constitutional rights were not infringed upon by permitting these students to be present in the court room. No pressure was placed upon the jury by their presence.

## III.

Mr. McNabb is a well known, able attorney. He certainly defended the petitioner in a vigorous manner. The very fact that Mr. McNabb volunteered to aid petitioner demonstrates Mr. McNabb's willingness to accept and perform his duties as an officer of this Court.

## IV.

Petitioner's fourth contention is somewhat misleading. The Honorable LaDessa Nordale, U. S. Commissioner, was duly sworn and testified for the government. Upon cross-examination, defendant attempted to show that at the preliminary hearing, the case against Mr. Burdix was dismissed on motion of the government, arguing that such dismissal was a bar to further prosecution. The Court's implied ruling

that a failure to prosecute a preliminary hearing was not a bar to prosecution under an indictment found by the grand jury was proper. (Compare: 66-18-18, A.C.L.A., 1949)

## V.

The instructions of this Court were clear and concise. Petitioner's fifth contention amounts to an objection that the Court did not direct a verdict of acquittal. Petitioner's objections in this paragraph of this petition are without merit.

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### CONCLUSION.

Petitioner, Eddie Burdix, was given a fair and impartial trial. He readily admitted his guilt, after the trial, and even attempted to help the Government by giving information concerning narcotics traffic in Alaska.

The Government contends that Mr. Burdix's petition is without merit and should be denied.

Dated at Fairbanks, Alaska this 15th day of December, 1954.

/s/ Theodore F. Stevens,  
United States Attorney.

Filed. In the District Court,  
Territory of Alaska, 4th Div.,  
Dec. 15, 1954.

John B. Hall, Clerk,

By .....

Deputy.

## AFFIDAVIT.

United States of America,  
Territory of Alaska.—ss.

Theodore F. Stevens, being first duly sworn, on oath deposes and says:

That he is the United States Attorney for this Division and that he personally prosecuted the case of Eddie L. Burdix, who is also known as "Shorty the Barber".

That at the preliminary hearing in this case, George McNabb, Esquire, objected to the introduction of any evidence acquired from the informant, unless the informant be produced and testify. The evidence involved was the narcotic drug alleged in the indictment herein which Burdix was alleged to have possessed, controlled and sold. Mr. McNabb's objection was sustained and upon my motion the case against Mr. Burdix was dismissed. The informant was not available to testify at that time.

However, the Grand Jury for this Division subsequently indicted Mr. Burdix for the same crime. At the trial of this case, Mr. Burdix was ably defended by Mr. McNabb. The evidence disclosed that Robert R. Thompson, U. S. Deputy Marshal, and David Carpenter, Treasury Agent, had obtained the services of Melvin Austin as an informant and that Austin had agreed to purchase heroin from Eddie Burdix. The two law enforcement officers searched Austin and then watched his actions as he met with Burdix. After keeping both Austin and Burdix under surveillance,

Austin was observed leaving Burdix and was immediately apprehended and searched. At that time the officers took from Austin's person the heroin subsequently introduced into evidence. Austin was brought before the Court at the trial. He testified about the transaction and identified the heroin as being the narcotic purchased by him from Burdix.

Burdix took the stand himself and insisted that he be able to narratively tell his story. He acted against the advice of his counsel and voluntarily disclosed irrelevant and immaterial matters.

Further, the Court was not cleared of adults. A few school children, from the local schools, visited the court room as a part of their "government" class. This visit occurred in the afternoon of the trial. These children did not exert pressure upon the jury, nor was their visit in any way connected with the prosecution of the case against Burdix.

The defendant was convicted on a verdict of guilty. He was sentenced to five years in an institution of a penitentiary type. The jury was comprised of four men and eight women. This jury panel was selected in accordance with the laws of Alaska on the subject.

After sentence, Mr. Burdix requested that he be permitted to confer with Mr. Thompson, Mr. Carpenter, and your affiant. A conference was held in the United States Attorney's Office. Mr. T. R. McRoberts, Acting U. S. Marshal, was also present. At that time, Mr. Burdix freely admitted that he had sold heroin to Austin, that he sold the heroin referred to in the

indictment to Austin and that he had also sold drugs to others. Burdix admitted occasional use of marijuana. The parole report filed by your affiant herein reflects that both his admission of guilty and use of narcotics was reported on the 28th day of May, 1954.

Dated at Fairbanks, Alaska this 15th day of December, 1954.

/s/ Theodore F. Stevens,  
United States Attorney.

Subscribed and sworn to before me this 15th day of December, 1954.

/s/ Wallis C. Droz,  
Notary Public in and for the Territory  
of Alaska. My commission expires:  
4-16-58.

**Appendix "B"**

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United States District Court, Territory of Alaska  
4th Judicial District

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Eddie L. Burdix,

Defendant,

vs.

United States of America,

Plaintiff.

} No. 1775

**ORDER.**

The Court has very carefully studied the motion of the prisoner, Eddie L. Burdix to vacate and set aside judgment and sentence.

As the Court views the showing made by the prisoner he does not claim that the sentence in his case was imposed in violation of the Constitution or laws of the United States or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or does he set forth a showing that the sentence was or is otherwise subject to collateral attack. The showing of the prisoner is confined to the insufficiency of the evidence and claimed errors of the Court during the trial.

After careful consideration of the motion and the files and records of the case, the Court concludes that

the prisoner's petition is without merit and must be denied.

Dated at Fairbanks, Alaska, this 4th day of March, 1955.

/s/ Vernon D. Forbes,  
District Judge.

177 Fed.Rep. 2nd Series  
Taylor v. United States

Appendix "C"

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In the District Court for the District of Alaska  
Fourth Judicial Division

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Eddie L. Burdix,	}	No. 1775
vs.		
United States of America,		
Defendant,		
	Plaintiff.	

**ORDER DENYING MOTION TO PROCEED IN FORMA PAUPERIS.**

This cause coming on before the Court upon the application of Eddie L. Burdix to be allowed to prosecute his appeal herein in forma pauperis, supported by the affidavit of Eddie L. Burdix, it is

Ordered that the application be and is hereby denied, and this Court certifies, pursuant to Section 1915 of Title 28 of the United States Code, that, in its opinion, the appeal is not taken in good faith.

Dated at Fairbanks, Alaska, this 6th day of May, 1955.

/s/ Vernon D. Forbes,  
District Judge.

Filed. In the District Court,  
Territory of Alaska, 4th Div.,  
May 6, 1955.

John B. Hall, Clerk,

By .....

Deputy.

**Appendix "D"**

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In the District Court for the District of Alaska  
Fourth Judicial Division

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Eddie L. Burdix,

Petitioner,

vs.

United States of America,

Respondent.

} No. 1775

**OPINION.**

Burdix has moved this court for an order directing the clerk of court to "immediately observe and comply with the requirement and specifications prescribed in Rule 75, Title 28, U.S.C. and forward to the United States Court of Appeals, 9th Circuit, . . . the requested records on appeal . . ."

Although Burdix's intention is not clear, it appears to be that the clerk of court has failed to forward to the Court of Appeals the transcript of the record. Burdix has been denied leave to appeal in forma pauperis, and makes no showing that the transcript requested has been transcribed by the court reporter and delivered to the clerk. Title 28, sec. 753.

The petition is ordered dismissed.

Dated at Fairbanks, Alaska this 15th day of November, 1955.

/s/ Vernon D. Forbes,  
District Judge.